this project—preclude any thought of a duplication of the local networks.

Only when a practical and economically-sound method is found for large-scale bypass or for connecting local consumers by a different method—as microwaves and satellites were ultimately found to be feasible for handling long distance traffic—can the Regional Companies' local monopoly be regarded as eroded. Accordingly, waivers of the restriction could not be granted based on an absence of state and local regulation unless these regulatory changes were accompanied by substantial changes in telecommunications technology, the economics of the provision of local telephone service, or both.

Second. As experience has shown, to hold out to the Regional Companies the prospect of piecemeal waivers or similar judicial orders under the imprecise conditions suggested by the Department of Justice would (1) serve to encourage their resistance to the grant of full equal access and (2) cause them to redouble their efforts to nibble incessantly at the edges of the restrictions, in the expectation that this would result in their complete entry into the prohibited markets. *See United States v. Western Electric Co.*, 592 F.Supp. 846, 867–68 (D.D.C.1984); *see also* Reply of Competitive Telecommunications Association at 5–8. In fact, executives of and spokesmen for the various Regional Companies rarely miss an opportunity to explain their desire, nay their right, to operate interexchange networks, and the groundwork for such expansion is laid whenever and wherever possible. *See, e.g.*, statement of Thomas E. Bolger, Chairman of Bell Atlantic, *Washington Post*, December 30, 1986, Business Section at 1. The uncertainty, turmoil, and confusion that would be created in the telecommunications industry by implementation of the Department's recommendation are as undesirable as they are unnecessary.

Third. As stated above, the Court has for some time sought to find means for phasing out or reducing its "oversight" responsibilities consistently with its responsibilities under the decree.[86] Several of the decisions made today are steps in that direction. *See* Parts VIII and IX, *infra*. However, if the Department's recommendations were adopted, the Court would become involved in detailed regulation of the Regional Companies with a vengeance.

The Court would be constantly reviewing requests for removal of interexchange and information services restrictions on a state-by-state, possibly county-by-county, basis, in order to determine whether local regulation had changed sufficiently to allow such removals in the particular area. In order to carry out that responsibility, the Court would have to review and to scrutinize, on an ongoing and unending basis, the effect, and possibly the purpose, of old and new state and local regulation of telecommunications providers all over the United States.[87] It is difficult to imagine a more systematic and offensive intrusion into local affairs, and on this basis, one intervenor aptly describes the Department of Justice proposal as "an affront to federalism." CP National Corporation Comments at 6.

The task prescribed by the Department of Justice is one that a federal court should undertake, if at all, only if that is absolutely essential for the protection of federal constitutional or other legal rights. Clearly, that is not the situation here, and the Court accordingly declines to enter that thicket.

For these reasons, the Court will not entertain applications for waivers that are predicated only upon changes in state or

86. *See, e.g., Western Electric Co.*, 592 F.Supp. at 873–75 (establishing procedure whereby Department of Justice reviews requests for waivers of line of business restrictions).

87. One example is cited by the Utilities and Transportation Commission of the State of Washington which points out that it has permitted local resale and shared tenant services but not the provision of basic local service by more than one telephone company in the same territory, adding, "[I]s the Department suggesting that the Court interpret state law to determine whether the Washington situation is a legally protected monopoly?" Comments at 16.

local regulation. Of course, if *prima facie* showings are made that, for technological or economic as well as legal reasons, competition in local exchange markets is feasible and has, in fact, emerged on a substantial scale, requests for removal of particular restrictions will be both entertained and granted. However, it may well be suspected that this will turn out not to be a piecemeal process as the Department of Justice envisions it, but an eventual broad-scale removal of restrictions as new technology or new market structures emerge on a nation-wide basis.[88]

D. *Complete Removal of the Restriction*

That leaves, then, the motions filed by the Regional Companies, supported by almost none of the other over one hundred seventy entities that have filed papers in this proceeding except the Federal Communications Commission,[89] that the restriction on the provision of interexchange services be removed *in toto*.

These requests are met initially by the obstacle, discussed *supra*, that, with the exception of the minuscule amount of traffic that bypasses the Regional Companies' facilities, their monopoly bottlenecks are as solid and pervasive as they were when the decree was entered. It is equally clear that nothing has occurred to change the decree conclusion that those in control of the local bottlenecks have the incentive and ability to use their monopoly power anticompetitively in the interexchange market.

In view of the history of past abuse of the bottlenecks in the Bell System's long effort to disadvantage long distance competitors detailed *supra*, and the continuing solidity and pervasive nature of the bottlenecks, a dissipation of the ability to act anticompetitively can be assumed only if some other fundamental change has occurred in the situation—a change that would permit the Court to find that, notwithstanding the continued existence of the local bottlenecks, the risk of Regional Company anticompetitive conduct in the interexchange market has disappeared.

It is suggested by the Regional Companies that changed circumstances have occurred in five respects:[90] (1) more effective regulation by the FCC; (2) the exist-

88. It is unlikely that, in a nation with vigilant competitors and an absence of interstate barriers to the flow of ideas and commerce, any such development will be confined to a single exchange area or a single region.

89. The FCC position does not, in any event, meet the section VIII(C) standard for removal of the restriction. The Commission simply never liked the decree with its restrictions to begin with, and it still does not. Even before the decree was entered, the FCC expressed its view that the restrictions on the Regional Companies were both unnecessary and unwise, Brief of Federal Communications Commission as Amicus Curiae at 30 (filed April 30, 1982), and earlier this year, Mark Fowler, then the Commission's chairman, stated that the Commission "consistently" felt that the decree should not have restricted the Regional Companies. Letter from FCC Chairman Mark Fowler to John Dingell, Chairman of House Committee on Energy and Commerce, at 1 (November 13, 1985). The decree herein is a final judgment of a federal court and thus valid and binding, the FCC's views as to its wisdom to the contrary notwithstanding.

90. In addition to arguments concerning these claimed changes, some of the Regional Companies resort to hyperbole having little relationship to the realities. Thus, Ameritech asserts, contrary to hundreds of pages of briefs, that "even the commentators that oppose regional company entry into their markets do not seriously suggest that any regional company could gain market power" over the markets at issue here (Reply at 1–2); that "nothing that any carrier says can obscure ... the proliferation of bypass options since 1982" (Reply at 26) (*compare* Part II–B, *supra*); and that "after three rounds of extensive briefing by all elements of the industry, involving the filing of 190 briefs comprising approximately 8,000 pages, have the opponents presented *any* evidence of Ameritech abuse of local exchange operations" (Reply at 33) (emphasis in original) (*compare* Part VII–A, *infra*). Such exaggeration does not enhance credibility.

Among the more imaginative additional arguments in favor of removal of the restriction is that of Bell Atlantic which points to the fact that the interexchange restriction has been the source of controversy and litigation before this Court. Memorandum in Support of Motion at 33–35. The Regional Companies cannot bootstrap their way out of the restriction by violating it and then, when someone complains, claiming that the restriction causes controversy.

ence of the seven Regional Companies in lieu of the one Bell System; (3) "substantial implementation" of equal access;[91] (4) the GTE analogy; and (5) the possibility of new antitrust suits.

The issue of regulation, which is common to the disputes involving all three of the core restrictions, is discussed with respect to all of them in Part VI, *infra*. As for the remainder, some of the claimed developments have not, in fact, occurred, and others have not had an effect on the interexchange services market.

1. *Division of Bell System Into Seven Companies*

Much is made by the Regional Companies of the circumstance that they are seven while the Bell System was only one. The difficulty with the arguments advanced based upon that undoubted fact is that the independence of the Regional Companies from the Bell System does not constitute a new development; it was mandated in the very same decree that also mandated the interexchange restriction. The decree, in fact, assumed the necessity for that restriction notwithstanding the breakup of the Bell System into seven or more new entities.[92]

During the proceedings that led to the approval and entry of the decree, the Bell System advised the Court that its evaluation of the decree could and should be premised on the existence of seven Regional Companies,[93] and the Court did just that.[94] The record shows without the slightest ambiguity that the consequences that were to flow from the divestiture and the restrictions were identified and taken into account in 1982 with respect to the post-divestiture Regional Companies, not merely the pre-divestiture Bell System.

That was so because the crux of the problem prior to the divestiture was not so much the size of the Bell System (although that played a part) but its control of the local exchange bottlenecks. Now that the control of these bottlenecks has shifted to seven regional entities, they must necessarily be limited as was the Bell System to prevent their exploitation of these bottlenecks, absent some substantive change. And, as discussed in detail above, there has been no substantive change: the bottlenecks are as pervasive as ever. It is undoubtedly for these reasons that the Department of Justice, too, recognizes that "the fact of divestiture itself" is not "a sufficient changed circumstance" to justify a modification of the restrictions. Reply at 57.[95]

The Regional Companies further argue that now, unlike then, benchmarks exist by which the performance of one of them can be measured against that of the six others.[96] Again, the possibility of the existence of benchmarks was necessarily included in the decree assumption which imposed the restrictions upon the several successors of the Bell System. Beyond that, as discussed in Part VI, *infra*, the Regional Companies are free, by virtue of the regulations proposed by the FCC, to adopt entirely dissimilar accounting and other procedures, making impossible intelligent

91. *See also* Department of Justice Report at 68–70.

92. Under the decree the restriction would have applied even if the Bell System had been divided into twenty-three independent entities (AT & T and the twenty-two Operating Companies). The combination of the Operating Companies under the aegis of seven holding companies thus constituted less of a dilution of centralization than the decree allowed.

93. AT & T Reply Comment dated May 21, 1982, at 4–5.

94. *AT & T*, 552 F.Supp. at 142 n. 41, 201, 214 n. 346.

95. The Regional Companies are far from being of a size that can easily be regulated or whose operations can be otherwise be scrutinized without difficulty. The smallest would rank in the Fortune 20 in terms of assets and the Fortune 50 in terms of sales. Comments of Dun and Bradstreet at 40–41. Moreover, their complex organizational structures compared to that of the Bell System further complicates any effective scrutiny of their activities to determine whether they are consistent with the decree. *See* sections V and VI of the decree.

96. *See, e.g.*, Ameritech Reply at 3–7.

benchmark comparisons between and among them.[97]

2. *Equal Access*

As concerns the issue of equal access mandated by Appendix B of the decree on which several of the Regional Companies rely as a changed circumstance, it is by no means established that this objective has been achieved. Several motions are pending before the Court in which the question of compliance by the Regional Companies with their equal access obligations is very much contested.[98] These motions raise substantial issues indicating Regional Company violations of their equal access obligations which the Court will have to resolve on their merits.[99] At least pending that resolution, removal of the restrictions could not conceivably be predicated upon an assumed fulfillment by the Regional Companies of their equal access obligations.

More fundamentally, however, even if the equal access requirements had been fully met,[100] a valid basis would not exist for a removal of the restriction on equal access grounds. If equal access had been all that was involved, the decree could have simply mandated the Bell System to provide such access in the same manner as Appendix B to the decree prescribes it for the Regional Companies. Instead, the decree directs the massive divestiture and compliance with the line of business restrictions. It can only be concluded from that choice that equal access was intended to reinforce the decree's basic relief provisions, not to be a substitute therefor.

Finally, equal access is not an objective that, once achieved, remains fixed and cannot be undone. On the contrary, to the extent that the Regional Companies have the incentive, the ability, and the freedom under the decree to do so, they may be expected to chip away at equal access as new configurations, changed technologies, and novel services provide the requisite opportunities.

The Bell System was for decades under various judicial and regulatory mandates not to discriminate with respect to access by competing interexchange carriers, and it managed as consistently to evade these mandates. The bottleneck monopoly provides opportunities for a wide range of means to disadvantage competitors.[101] The Department of Justice has correctly stated that "without significant technological and market structure changes, these dangers will not disappear even after full equal access is achieved, for as the *AT & T* case showed, network standards and information flows can be used by an exchange provider to disadvantage competitors." Reply at 62.

97. Additionally, the Regional Companies are, of course, quite capable of cooperating with each other, if necessary, to defeat any benchmark-type comparison scheme.

98. Furthermore, as the Kentucky Public Service Commission observes, Regional Company conversion plans indicate that many small or rural end offices will not be converted to equal access until into the 1990s or even well beyond the year 2000. Comments at 16.

99. That the motions are not frivolous is demonstrated by the fact that several Regional Companies even now object to the grant of equal access to interexchange and information service providers, *e.g.*, Bell Atlantic Response at 2–9; U S West Response at 6–7, 9–10, and that these same companies and several others object to the suggestion of the Department of Justice that they provide equal access with respect to their cellular operations. *See* Subpart F, *infra*.

100. As ALC Communications Corporation correctly notes, by any standard, approximately thirty percent of the lines served by the Regional Companies nationally have *not* been converted to equal access. Comments at 14.

101. It is alleged that in each of the states that allows intrastate competition, the Regional Companies are disadvantaging their intra-LATA competitors (*e.g.*, by denial of equal access, refusal to permit Centrex to be used to deliver long distance traffic to independent carriers, denial of WATS access). Comments of ALC Communications Corporation at 18–23. If those claims are true in whole or in part—and the Court has insufficient facts at this time on which to base a conclusion—it would not augur well for the future should the restrictions on interexchange be lifted.

3. *The GTE Analogy*

Several Regional Companies[102] argue that, inasmuch as the Court approved the antitrust consent decree involving GTE, which does not include line of business restrictions similar to those in the instant decree, consistency requires the removal of the restrictions here. There is no merit to that contention.

[7] In the first place, it cannot reasonably be argued that the adoption of the GTE decree constitutes a change in terms of the section VIII(C) standard of the decree in the instant case. To put it another way, the Regional Companies lack standing to seek a modification of this decree merely because the Department of Justice agreed to a consent decree in another antitrust suit with an entirely different defendant, and the Court approved that decree. The Department of Justice was surely not required under law to insist upon parity in the *GTE* case with the remedy adopted in the *AT & T* case.[103] As for the Court, it was obliged to give, and it did give, considerable deference to the parties and the agreement they had reached when it, in turn, passed on the GTE consent decree. *AT & T*, 552 F.Supp. at 151.[104]

Furthermore, when the Court approved the GTE decree in December 1984, it carefully considered the similarities and differences between the Regional Companies and GTE, and it concluded, agreeing with the Department of Justice, that different treatment was justified, for the following reasons:

> To be sure, in some significant respects, particularly size and scope of operations, GTE more or less matches the Bell Regional Holding Companies (at least the smaller ones). In other ways, however, the two types of entities differ to some substantial degree.
>
> Each of the Bell regional companies has a very strong, dominant position in local telecommunications in the area in which it serves; GTE's operations, by contrast, are widely scattered. Moreover, the Regional Holding Companies also have the facilities to provide all the intercity and inter-LATA traffic throughout their regions, while the GTE Operating Companies control little by way of intercity facilities, and what facilities they do have are by and large of the entrance type which do not cover the areas in which the companies operate. (Transcript of Hearing at 40–41). Finally, internal planning documents of GTE and Sprint indicate that Sprint's interexchange network will, even by 1985 or 1986, reach only sixteen GTE cities (Transcript of Hearing at 42), and the Department of Justice has observed that of all access lines in existence, only one or two per cent are in GTE cities, and that Sprint has the fewest of these. (Transcript of Hearing at 41). All these factors suggest that entry by other interexchange carriers into the local markets dominated by GTE is far less likely and the anticompetitive effects of improper GTE actions will be both less probable and more easily detectable (footnotes omitted).

United States v. GTE Corp., 603 F.Supp. 730, 737 (D.D.C.1984). Nothing of significance has occurred since the GTE decree was entered to alter that assessment.

It is also worth noting that, when counsel for the Department of Justice appeared before the Court to defend the GTE settlement, he advised the Court that, should the Court believe that approval of that settlement might in any way cast doubt upon the appropriateness of the restrictions in the Bell System decree, the Department would prefer that the Court disapprove the GTE consent decree rather than to cast any shadow on the Bell System decree, particu-

102. *See, e.g.*, Southwestern Bell Comments at 25–27; U S West Comments at 39–40.

103. The fact that one of the seven Regional Companies may or may not be more dispersed than GTE was at the time of the consent decree, *see* U S West Reply at 23 and supplemental Appendix 6, is therefore irrelevant.

104. As indicated above, the decree in the Bell System case basically rests upon the twin pillars of (1) the divestiture of the Operating Companies from AT & T, and (2) the line of business restrictions on the divested companies. The GTE decree involves a different structure and different remedies.

larly its line of business restrictions.[105] The Court approved the GTE decree on that basis.

4. *New Antitrust Actions*

The Department of Justice and several of the Regional Companies argue that the restrictions are unnecessary because, should the companies act in an anticompetitive manner, it would always be possible to remedy the situation by a new antitrust action.[106] The Department of Justice supports that contention, generally when other explanations fail.[107]

The decree restrictions were to constitute a prophylactic measure, one that would prevent future antitrust violations and thus render new antitrust suits or similar actions unnecessary. *AT & T*, 552 F.Supp. at 150. It would be illogical or worse to destroy one of the two pillars of a decree that was adopted after an enormous litigation struggle lasting almost ten years, on the basis of the thin hope that, following the evaporation of the essential relief afforded at the conclusion of that struggle, the Department would bring a new antitrust action to start the cycle all over again.[108] In fact, the Department itself has in the past called the idea of enforcement through a new antitrust action "disingenuous." Department of Justice Reply to Responses to the Department's Proposals Regarding Section VIII–C Waivers, April 5, 1984 at 49.

E. *There Is Competition in the Markets*

It is not without significance that competition now exists in the interexchange market, and that the entry of the Regional Companies into that market is not necessary to give it vitality. To be sure, AT & T still retains the lion's share of that market, but there are now some 530 long distance carriers in the United States, eight of them serving twenty-five or more states. *See* Federal Communications Commission, Summary of Long Distance Carriers, at 2–3 (March 12, 1987); *see also* FCC Comments at 34–35 & n. 39. According to the Department of Justice, AT & T's rivals appear to be making sufficient progress that it would be at least premature to view the entry of the Regional Companies as necessary to preserve interexchange competition. Response at 45. The Court agrees with that assessment.

F. *Mobile Services*

[8] The Department of Justice still recommends that the interexchange services restriction be lifted completely with respect to cellular radio, paging, and other mobile interexchange services. Response at 54–59. The basic reason given for this recommended modification is that mobile services constitute markets separate from landline interexchange services,[109] and that, as the Department puts it, everyone recognizes that, because of its higher price and limited capacity, cellular radio and other mobile services cannot be substitutes for the landline services, and that such services therefore constitute a separate market. Response at 55.[110]

105. GTE Transcript of November 22, 1983 at 60–61.

106. Department of Justice Report at 53; Response at 99, 123–24; AT & T Reply at 51.

107. To cite a few representative examples, in discussing possible Regional Company joint ventures, the Department, rather than to analyze their anticompetitive potential in terms of the decree, states that they "would have to be analyzed in each instance under Section 7 of the Clayton Act or Section 1 of the Sherman Act" (Response at 99); in regard to an intervenor suggestion of *de facto* market division by the Regional Companies, the Department observes that any such division "would violate the Sherman Act and be dealt with accordingly" (Response at 120 n. 235); and that, if the companies used Bellcore (*see* pp. 558–59, *infra*) as a vehicle for collusion "the government could take appropriate antitrust enforcement action" (Response at 123).

108. The author of a book on the AT & T divestiture quotes Department of Justice attorneys as wondering whether the relationship between the federal government and the Bell companies is "to become a never-ending cycle of lawsuits, settlements, scandals, and resentments." Coll, *The Deal of the Century* at 230–31 (1986). *See* note 8, *supra*; *see also* Comments of Information Industry Association at 25 n. 61.

109. *See United States v. Western Electric Co.*, 578 F.Supp. 643, 650–51 (D.D.C.1983).

110. As for paging, it is said that it cannot compete with landline interexchange service because in any event it operates only on a one-way basis.

The Department's analysis appears to be correct, at least as of now,[111] but that alone does not resolve the issue before the Court. On a purely literal level, interexchange cellular radio is an interexchange service as defined in section II(D)(1) of the decree. As such, it is of course prohibited to the Regional Companies absent developments that would cause the Court to find that, contrary to cellular radio's status at the time of the entry of the decree, its dynamics have changed to the point that there is no longer a substantial possibility that it could be used to impede competition. It cannot reasonably be claimed that such new developments have taken place.

More substantively, the entry of the Regional Companies into the cellular business without individualized scrutiny[112] would raise precisely the same concern that led to the adoption of the interexchange restriction in the first place: the possibility of discrimination against interexchange competitors in the provision of the access needed to reach the cellular customers.[113] A number of developments contribute to the conclusion that such discrimination is not only possible but probable.

In the first place, several of the Regional Companies are not even willing to accede to the minimal Department of Justice recommendation that, should they be allowed into the interexchange market, they grant complete equal access to competing interexchange carriers, included in the intra-LATA portion of the cellular systems.[114]

Moreover, without even having been in the interexchange cellular business across the board, the Regional Companies appear to have engaged in acts of discrimination against other mobile services providers—activities that do not inspire confidence that, should the companies be permitted to enter the cellular market without limitation, they would treat competitors in an even-handed manner. According to the Huber Report itself—upon which the Department of Justice otherwise heavily relies—the Regional Companies have used their control over the local bottlenecks in a variety of ways to impede competition by providers of mobile service. Some of these anticompetitive activities are catalogued at pp. 580–81, *infra*.

There is also the broader concern that, should the motions be granted, a Regional Company could evade the basic interexchange services restriction itself by the simple expedient of constructing a connection between its mobile telecommunications switching offices and any of their standard end offices, thus providing long distance service throughout the country through a combination of cellular and standard interexchange facilities.

Several of the Regional Companies, *see, e.g.*, U S West Memorandum at 159–60 & n. 171, rely on the grant by the Court of several waivers on a case-by-case basis with respect to interexchange cellular services, contending that such waivers established the principle that the test of section VIII(C) has been satisfied. Not only is that contention entirely erroneous, but it exemplifies the attempts made from time to time by Regional Companies to take advantage of extremely limited precedents as bases for broad departures from the requirements of the decree.

Whenever the Court has granted waivers, it was essentially in the context of representations that highways and automobile traffic patterns (typically in large met-

111. There are indications that the cost and the price of cellular radio are falling, and that in the future it may become competitive with landline interexchange services.

112. Such scrutiny is now provided by the waiver request mechanism.

113. For that reason, the Department of Justice in 1983 took precisely the opposite position to that which it is taking now. Memorandum of the United States of May 19, 1983, at 18, although cellular radio then, even more than now, served a separate market.

114. In response to the Department of Justice's equal access recommendation, one Regional Company observed that there was no "sound reason why Bell Atlantic should be required to provide equal access to inter-LATA calls completed within an area served by the same cellular switch." Bell Atlantic's Opposition to Conditions Specified in the Department's proposed Order, at 11.

ropolitan areas) were such that the public benefits accruing from slight departures from the strict LATA boundaries to accommodate motorists with cellular phones were so substantial that they outweighed, on this limited basis, the dangers to fair competition. *AT & T*, 578 F.Supp. at 647–48; Memorandum of January 28, 1987 at 3. These waivers are not precedents for the broad relief the Regional Companies seek, and that relief, were it to be granted, would enable these companies to impede competition on a significant scale.

There is no basis under the decree for the removal of any of the restrictions on interexchange services, and the requests for such relief will be denied.

IV

Manufacturing

A. *History*

[9] Section II(D)(2) of the decree, as amended by section VIII(A), prohibits the Regional Companies from manufacturing or providing telecommunications products or manufacturing customer premises equipment[115] (CPE).[116]

In every significant respect, this restriction mirrors one of the other core restrictions, that on interexchange services: the manufacturing restriction, too, is based on voluminous trial evidence; the local monopoly is as central to the market here as it is to the interexchange services market; and the incentive and ability to act anticompetitively have not been significantly altered by the division of the Bell System into seven Regional Companies, by FCC regulation,[117] or by any other factor. Indeed, in one respect the consequences of a removal of the manufacturing restriction would be even more visibly and directly counterproductive than a removal of the interexchange restriction: a flourishing, broad-based, innovative industry would be cut back to become one dominated by a small number of muscle-bound giants, possibly dominated by foreign conglomerates.

The manufacturing restriction[118] was based in substantial part on evidence presented by the Department of Justice at the trial of this case indicating that the Bell System had improperly monopolized the market for telecommunications equipment, in that its local Operating Companies purchased such equipment primarily from Western Electric Company, the System's manufacturing affiliate, and "engaged in systematic efforts to disadvantage outside suppliers." *AT & T*, 552 F.Supp. at 190–92. Further, the evidence suggested that, while the Bell System's anticompetitive activities in the long distance market were largely formulated by AT & T headquarters, the discriminatory procurement practices were primarily those of the local Operating Companies.[119]

Since the Bell System accounted for over eighty percent of the nation's central office switching and transmission equipment purchases,[120] only small fractions of the market remained open to independent manufacturers. Specifically, the Department alleged, and it appeared to the Court,[121] that the local Operating Companies had en-

115. *AT & T*, 552 F.Supp. at 227.

116. CPE includes equipment employed on the premises of anyone other than a carrier that is utilized to originate, route, or terminate telecommunications. Section IV(E). It does not include equipment used "to multiplex, maintain, or terminate access lines." Section IV(N) defines telecommunications equipment as "equipment, other than [CPE], used by a carrier to provide telecommunications services."

117. No one reading the trial transcript could seriously refer, as does BellSouth, to "the long and successful history of FCC regulation of equipment network interfaces and related carrier practices." Response to Motion for Relief, at 11. *See also* note 202, *infra*.

118. The entire section II(D)(2) restriction, including that prohibiting the provision (*i.e.*, the marketing) of telecommunications products, will herein generally be referred to as the manufacturing restriction.

119. The evidence was somewhat in conflict on the question of the degree of direction given in that regard by AT & T headquarters.

120. *See* Huber Report at 1.15.

121. *See AT & T*, 552 F.Supp. at 190; *AT & T*, 524 F.Supp. at 1371, 1374; *see also* Department of Justice Competitive Impact Statement at 15.

gaged in three general types of anticompetitive conduct with regard to the telecommunications equipment and CPE markets.

First. As testimony and other evidence demonstrated, the Operating Companies managed, by one strategem or other, to purchase Western Electric's products, even when those products were more expensive or of lesser quality than alternative goods available from unaffiliated vendors.[122]

Second. The Operating Companies and Bell Laboratories (the Bell System's central research and engineering affiliate)[123] engaged in discrimination in the dissemination of information and design by granting Western Electric premature and otherwise preferential access to necessary technical data, compatibility standards, and other information about the Operating Companies' needs and requirements and the evolving characteristics of the local exchange. The delays encountered in these respects by Western Electric's competitors frequently made it difficult, if not impossible, for them to compete for Operating Company business: Western Electric was ready with the products when they were needed, and the competitors were ready several months later. The not unexpected result was a further skewing of procurement toward the Bell System's manufacturing arm and away from independents.

Third. The Bell System subsidized the prices of its equipment with the revenues from the Operating Companies' monopoly services.[124] The effect of this practice, as with respect to cross-subsidization generally, was (1) to permit the Bell System to undercut other producers of equipment (which lacked such a subsidy), and (2) unfairly to burden the consumers with exces-

122. More specifically, the Court found, commenting on the government's evidence of anticompetitive conduct:

> This evidence tended to show that the general trade manufacturers encountered a considerable number of obstacles in trying to design equipment for, and to sell this equipment to, the Bell Operating Companies, and that these obstacles perpetuated a buy—Western bias. For example, the competitors had difficulty in locating the employee in Western or the Operating Companies authorized to negotiate a sale; in obtaining from Bell compatibility specifications (without which general trade products could not be designed for interconnection with the Bell network); and in persuading Bell Labs to complete objective evaluations (which were usually required before sales could be effected). The government's evidence further indicated that Bell did not authorize the purchase of the general trade equipment even if no Bell product of equivalent quality, cost, or technical sophistication was available; instead, crash programs were initiated to develop competing Western products (to the extent that, in one instance, Western literally copied the general trade product so that it did not need to wait for the design and development of its own model). Operating Company employees were under pressure from AT & T officials to buy from Western (even when a general trade product was cheaper or of better quality) or to wait until a Western product comparable to the desired general trade equipment was available, and they were required to provide detailed justifications for general trade purchases which were not necessary for the purchase of Western equipment.
>
> The evidence supporting the seventeenth episode, the "umbrella" package, shows that, despite a stated policy to the effect that the Operating Companies were to buy the best quality equipment at the lowest price regardless of source, the structural relationship among the various components of the Bell System generated a pro-Western, or in-house bias in the Operating Companies' purchasing practices (footnotes omitted).

AT & T, 524 F.Supp. at 1371–72.

123. Bell Laboratories is a scientific facility that has often been said to be without parallel anywhere in the quality of its scientific achievement.

124. The Court described this process in its 1981 Opinion as follows:

> ... [the government's] experts have testified that a combination of vertical integration and rate-of-return regulation has tended to generate decisions by the Operating Companies to purchase equipment produced by Western that is more expensive or of lesser quality than that manufactured by the general trade. The Operating Companies have taken these actions, it is said, because the existence of rate of return regulation removed from them the burden of such additional expense, for the extra cost could simply be absorbed into the rate base or expenses, allowing extra profits from the higher prices to flow upstream to Western rather than to its non-Bell competition. *See Byars v. Bluff City News Co.*, 609 F.2d 843, 861 (6th Cir.1979); *Six Twenty-Nine Productions v. Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir.1966); 3 Areeda & Turner, *supra*, ¶ 726, p. 218 (footnote omitted).

AT & T, 524 F.Supp. at 1373.

sive rates for the monopoly services they were furnished by the Operating Companies. These rates reflected not only the costs of those services but also the Bell System's need for funds for underselling the manufacturers and providers of non-monopoly products, *e.g.*, those engaged in the business of making or selling telecommunications equipment or CPE.

These various abuses should in theory have been discovered and corrected by federal and state regulators, but the evidence showed that, due to the size, power, and complexity of the Bell System and its Operating Companies compared to the small, inadequately staffed regulating bodies, this rarely occurred. *See* Part VI, *infra*. Moreover, when occasionally regulators did issue orders to halt improper activities, the Bell System routinely petitioned for reconsideration or rehearing, sought regulatory or judicial stays, played federal law and regulation against state law and regulation and vice versa, and in other ways delayed action until the regulators, more often than not, lost interest or gave up in frustration.[125]

In approving the restriction on the manufacture of telecommunications equipment and CPE, the Court observed that such equipment, to be of practical use, had to be connected, directly or indirectly, to a local exchange.[126] The Court also concluded that there is a critical interdependence between telephone company equipment and CPE: the standards for one dictate the standards for the other. Since the Regional Companies were free to choose which equipment to locate in their central offices, they were able to dictate the standards to which the CPE had to be designed.

All these problems were exacerbated by the fact that, due to the monopoly power possessed by the Operating Companies in the exchange telecommunications end product market, they lacked the competitive restraints "that ordinarily prevent the typical vertically-integrated company from engaging" in discrimination and cross-subsidization. On this basis, the "Operating Companies ... would be able to pay inflated prices for poor quality equipment and to reflect these costs in their rates without suffering a diminution in revenues." *AT & T*, 552 F.Supp. at 190; *AT & T*, 524 F.Supp. at 1368–70. The Court therefore concluded that, inasmuch as there was no competition in the end product market, *i.e.*, exchange telecommunications, and the purchasing decisions of the Operating Companies were largely immunized from competitive pressures, widespread abuses became possible and, in a sense, almost inevitable.

Since the Regional Companies were to become the "heirs" of the Bell System with respect to ownership and control of the local Operating Companies and their facilities, with the identical incentives and abilities as the Bell System in the telecommunications equipment market, the parties agreed on and the Court approved the manufacturing restriction on these companies embodied in section II(D)(2) of the decree. This, the Court decided, would ensure that purchasing and design discrimination and the consequent misallocation of costs would not be re-created. *AT & T*, 552 F.Supp. at 190–91.[127] And it also concluded that, if after the break-up the Regional Companies were permitted to manufacture CPE or telecommunications equipment or to market such equipment,[128] nonaffiliated

125. The legality of some of these Bell System actions was considered by the Court in the context of the *Noerr-Pennington* doctrine. *AT & T*, 524 F.Supp. 1361–64.

126. *See also* MCI Response at 70.

127. The Court also found that the "minimal additional competition" that the Regional Companies could provide to an already competitive CPE market did not "outweigh the substantial possibility that [the Operating Companies] would engage in anticompetitive conduct." *Id.* at 191. *See* Subpart C, *infra*.

128. The Court determined that the Regional Companies did not need to be restricted from providing, *i.e.*, marketing CPE, as distinguished from manufacturing it, because any risk of anticompetitive behavior in marketing was minimal due to the necessary participation of independent manufacturers who were unlikely to be partners in an antitrust conspiracy. *AT & T*, 552 F.Supp. at 191. It also found that to allow the Regional Companies to market CPE manufactured by others could provide a meaningful balance against AT & T's dominance of the CPE market. *Id.* at 192. For these reasons among

manufacturers would once again be disadvantaged and "the development of a competitive market would be frustrated." *Id.*

B. *Anticompetitive Activity is Probable*

In view of that relatively recent history, the question before the Court is whether a removal of the restriction is justified under section VIII(C) or whether such a removal would present a substantial risk that conditions of anticompetitive activity, concentration of the telecommunications equipment market in a few hands, monopolistic pricing, and a relatively sluggish pace of innovation, will return.

As will be seen *infra*, the short answer to the question about a renewal of anticompetitive activity here, as with respect to the interexchange restriction, is that no changes have occurred in the last three years that would warrant removal of the restriction on manufacturing: (1) the Regional Companies still have an ironclad hold on the local exchanges; (2) collectively they account for the purchases of what may be estimated at seventy percent of the national output of telecommunications equipment, only slightly less than the share of the pre-divestiture Bell System; (3) if the restriction were lifted, the Regional Companies may be expected to act as did the Bell System: they would buy all, or almost all of, of their equipment requirements from their own manufacturing units rather than from outsiders; (4) no measures, regulatory or otherwise, are available effectively to counteract such activities; and (5) in short order following removal of the restriction, a return to the monopolistic, anticompetitive character of the telecommunications equipment market would be likely, if not inevitable. The Court will now elaborate on several of these conclusions.[129]

The Department of Justice claims that technological and market changes, in addition to the existence of improved federal regulation, have rendered the manufacturing restriction unnecessary,[130] and in this assessment it is of course supported by the Regional Companies.[131] These changes, it is said, eliminate any substantial risk that the Regional Companies could use their monopoly power in the various telecommunications equipment or CPE markets.[132] That analysis is riddled with serious flaws.

First. The Department and the Regional Companies rely in substantial part on "the continued dispersal of equipment consumption, and the steady consolidation of equipment production," *e.g.*, Department of Justice Report at 161, stemming from the creation of the seven Regional Companies. On this basis, they claim that, because each company accounts for no more than a relatively small percentage of the purchases in any particular market, the purchasing decisions of one or several Regional Companies cannot have much impact on competition in the equipment market as a whole.

As explained above, on the most basic and literal level the existence of the seven Regional Companies is not a new development not contemplated when the decree was entered. Those who drafted, submitted, and approved the decree included the restriction on manufacturing at the same time as they provided, in the same decree, for the break-up of the Bell System into as many as twenty-two or as few as seven local units and hence into the corre-

others, the Court required modification of the proposed decree to permit the Regional Companies to provide CPE. Section VIII(A).

129. One of the issues, the impact of regulation, if any, is discussed in Part VI, *infra*.

130. Department of Justice Report at 161–71.

131. *See, e.g.*, Ameritech Comments at 7–10, 32–41; U S West Comments at 32–34; Bell South Comments at 19–24; Southwestern Bell Comments at 54–60. The FCC, too, supports the removal of the manufacturing restriction, as it does with respect to all the other restrictions, and as it did from the day they were entered as part of the judgment in this case. However, as will be seen below, another government agency, the NTIA of the Department of Commerce, expresses serious doubts on that score.

132. The Regional Companies have made no effort to show that any particular market to which they refer is a "relevant market or submarket" for purposes of antitrust analysis or that they do not possess market power therein. *See Standard Oil Co. v. United States*, 337 U.S. 293, 299–300 n. 5, 69 S.Ct. 1051, 1055 n. 5, 93 L.Ed. 1371 (1949).

sponding dispersal of purchasing power.[132] To make sense of the decree as a whole, therefore, it must necessarily be assumed that something more than the seven-fold division of the purchasing decisions is required to constitute the changed circumstances contemplated by section VIII(C) as a prerequisite to a removal of the manufacturing restriction.[134]

It is true, of course, that any particular Regional Company does not, by itself, have a dominant share in the national equipment market. This does not vitiate the substantial possibility, however, that even on its own, such a company could use its monopoly power to engage in anticompetitive conduct in the equipment markets, national or regional.

The Department of Justice concedes that if the restriction were lifted, each of the Regional Companies would satisfy all or nearly all of its equipment needs from its own manufacturing affiliate.[135] Dr. Huber estimates that exclusive in-house purchasing by any particular Regional Company will, depending upon the type of equipment, foreclose five to fifteen percent of the United States equipment market,[136] although with respect to some items of equipment that proportion may reach as high as twenty percent.[137]

[10] These figures are of course highly significant in and of themselves. Under the law, serious competitive concerns are raised even when relatively small market shares, for example as low as seven or eight percent, would be foreclosed as a result of leveraging of regulated monopolies into a related but unregulated market. *See Otter Tail Power Co. v. United States, supra; Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275–76 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 788 (1980); *AT & T*, 524 F.Supp. at 1379 n. 174; *International Tel. & Tel. Co. v. GTE Corp.*, 449 F.Supp. 1158, 1177–83 (D.Hawaii 1978). This leveraging doctrine serves antitrust interests by assuring that more efficient producers are not excluded from the market, and it prevents frustration of public regulation of subscriber rates.[138]

133. *See* Part III–C–1, *supra*.

134. When it signed the decree, the Court found that, although the companies would thereafter be functioning independently, they would have the same incentives and abilities to discriminate in the same manner as when they were functioning under the auspices of the Bell System. *AT & T*, 552 F.Supp. at 190–92. The Court approved the manufacturing restriction presented by the parties precisely because of its conclusion that a substantial likelihood existed that, if permitted to manufacture telecommunications equipment, any one or all of the seven Regional Companies could and, considering the existing incentives would, disadvantage unaffiliated manufacturers and foreclose competition in substantial portions of the market.

135. Department of Justice Report at 169–70; *see* Huber Report at 14.13. The Department also speculates that, due to the high costs, risks, and economies of scale, it is more likely that Regional Company entry into production of central office switches would be as part of a joint venture with an existing central office switch manufacturer rather than on an individual basis. Department of Justice Report at 174–77; Response at 107. That may be correct, but it obviously does not support elimination of the restriction. *See* Subpart C, *infra*.

An investigation conducted by the New York Department of Public Service showed that New York Telephone, a subsidiary of NYNEX, made seventy-five percent of its purchases of office supplies, telephone circuit cable, and other such equipment from MECO, another NYNEX subsidiary. Initial Brief at 18. That experience is some indication of what would occur if the Regional Companies had the authority to manufacture telecommunications equipment and CPE.

136. Huber Report at 1.15, 14.8, 14.13–14; *see also* Department of Justice Report at 169–70, 74–75. Although, depending upon the perspective, there may be four or more equipment submarkets, there is sufficient overlap between them that analytical flaws applicable to one type of equipment will not taint the conclusions with respect to the others. Comments of Tandy Corporation at 18.

137. According to figures supplied by one Regional Company, the share of central office switch purchases in 1985 attributable to these companies was seventy-six percent (compared to the Bell System's 1981 purchases of eighty-one percent), and their share of wire cable purchases was seventy-one percent. U S West Appendix, Table 12, at A–3, A–4.

138. The Department of Justice espoused this doctrine throughout the pendency of the *AT & T* proceedings in this Court. *See, e.g.*, Memoran-

Additionally, the cited figures actually fail to present the full measure of the anticompetitive situation since they focus entirely on national and even international markets. *See, e.g.*, Department of Justice Report at 171–72 n. 337, 173. To obtain a realistic picture, one must also evaluate the individual Regional Company power in their regional markets or submarkets. *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 324–25, 82 S.Ct. 1502, 1523–24, 8 L.Ed.2d 510 (1962). In their regions, these companies occupy positions of unquestionable dominance,[139] and substantial anticompetitive effects would be felt in these regional markets if the manufacturing restriction were lifted.[140]

Suggestions have been made that, at least with respect to some items of equipment, not all Regional Companies would purchase it from their own affiliates. Not only is any such assumption contradicted by the Department of Justice and Huber reports,[141] but experience since divestiture has been that Regional Companies have entered markets, many entirely foreign to telecommunications, just as quickly as they were legally free to do so by judicial construction, waiver, or otherwise, and occasionally even when they were not legally free to do so. It would be entirely unrealistic to assume that these companies would hereafter fundamentally reverse their pattern of behavior and refrain from entry into the telecommunications and CPE businesses that are allied to enterprises in which these companies are already engaged and that are potentially fertile sources of cross-subsidy skim-offs.

The companies may also be expected to be motivated to enter these markets by the dynamics of the relations among them and the imperatives of the marketplace. Their corporate images will not tolerate their abstention, and a Regional Company that opted out may be found by shareholders and others to have passed up a profitable extension into an adjacent market.[142]

dum in Opposition to Defendants' Motion for Involuntary Dismissal, pp. 72–80, 363; Pretrial Brief for the United States, pp. 48–54, 57–60; Competitive Impact Statement at 9; Reply dated April 5, 1984 regarding section VIII(C) waivers, pp. 7, 14–16. Now, inexplicably, the Department states that antitrust concerns are not raised when monopolies are leveraged into a substantial portion of the equipment manufacturing market. Department of Justice Report at 162, 166, 176. No reason is furnished for this change in analysis.

139. Only large central office switches require economies of scale greater than those allowable in one Regional Company area. Huber Report at 16.16–17.

140. For example, Dr. Huber has concluded that elimination of the restriction would permit the Regional Companies to keep critical design information from non-affiliated manufacturers. Huber Report at 14.13, 14.20, 16.15, 16.19. Another conceivable course of conduct by the Regional Companies that could have an anticompetitive impact involves the provision of voice-data services that use the local loop simultaneously for voice conversations, data transmission, and other related services. In order for the local loop to be used in that manner, an electronic device is required on each end of the loop. *See* IDCMA Comments at 20–22. If each Regional Company had approximately nineteen million access lines, Huber Report at Table G.4, and each electronic device cost $300 per line, then each such company could control approximately a $6 billion equipment market within its own region. Translating this statistic to a national focus, more than a $40 billion market could be foreclosed to competition. "Such a development would be the death knell for domestic data communications equipment manufacturers." *See* IDCMA Comments at 20–21.

141. *See* note 135, *supra*. The Huber Report goes on to say (at 14.16–17):

> A much more plausible scenario would have the RHC entering into a joint venture with one of the established domestic or foreign manufacturers and then using its own captive affiliate to provide a protected sales base from which to attack national and international markets. Most foreign manufacturers are virtually guaranteed profitability in their home markets, by subsidies or captive sales at inflated transfer prices. For them, anything earned in the United States is a windfall. Indeed, many of these manufacturers claim to be aiming for about a 5 to 10 percent share of the U.S. market, which equates to about one RBOC's purchases. Of course, under any requirements contract between a foreign manufacturer and an RBOC, the affiliates would be fairly free to customize switches, develop idiosyncratic standards, and then charge speciality transfer prices for the specialty product provided.

142. *See* Comments of North American Telecommunications Association at 11–18.

In any event, as explained above, section VIII(C) of the decree prohibits the lifting of a line of business restriction if a Regional Company merely "could" impede competition in the market it seeks permission to enter; it does not charge the Court with finding that such a company "would" do so. In law, under section VIII(C), and in experience on the basis of Regional Company behavior to date, it is reasonable to assume that all the Regional Companies would enter the manufacturing market; that they would satisfy all or nearly all of their equipment needs from their own manufacturing subsidiaries; and that they would thus foreclose on an average some seventy percent or more of the various equipment markets.[143] This would of course constitute an enormous step back to the pre-divestiture situation.[144]

In addition, Regional Company conduct taken in response to its incentive to purchase equipment from its own affiliate or joint venture partner (*see* Subpart C, *infra*), would tend to create a balkanized, ideosyncratic equipment market in which each manufacturer would sell primarily to the Regional Company with which it was affiliated—a development that would even further shrink, and shrink drastically, the size of the equipment market that was not simply parasitical.[145]

C. *Joint Regional Company Actions*

These threats to competition would be further aggravated if the Regional Companies acted in concert with respect to manufacturing and purchasing. There has been no showing nor even plausible speculation that the companies could not or would not act in combination (1) by entering into explicit or implicit agreements with each other regarding specifications or interconnection requirements, or (2) by disadvantaging unaffiliated manufacturers by making use of their participation in Bellcore.[146]

It is argued that the Regional Companies are more likely to compete fiercely with each other for the procurement business than to act jointly and in combination. It will no doubt occur to some or all of these companies, however, that each of them would benefit financially if it could manufacture for sale and sell in its own region, all of its manufacturing output, without fear of the only formidable competition—another Regional Company—and thus possess an enormous captive market.[147] Cutthroat competition by all against all in all the regions would not look nearly as attractive from an economic point of view.

It has also been suggested that collusion through the Bellcore connection could be prevented by limiting Bellcore's permitted range of activities. Department of Justice Report at 178. That argument, too, looks far more palatable in concept than it does when the necessary details of implementation are examined. No proponent of the Bellcore-limitation approach has suggested, either generally or specifically, how that entity's activities should or could be limit-

143. Assuming a conservative ten percent share of the national market per Regional Company.

144. The Court does not agree with the implication of suggestions, such as those advanced by Ameritech, that, because the Regional Companies purchased about eighty percent of the metal cable sold to telephone companies, this was "only a part of the total market for metal cable" and purchasing power was therefore dispersed. Comments at 35 n. 27.

145. This need not occur immediately. As has been pointed out, it is self-evident that, over time, each of the Regional Companies will not forego the opportunities to confer competitive advantages on its "house" brand of CPE, and manufacturers will soon learn that it is more profitable and less troublesome to affiliate with a Regional Company rather than to attempt to market CPE on a nationwide basis. Opposition of North American Telecommunications Association at 9.

146. Bellcore was originally known as the Central Staff Organization. *Western Electric Co.*, 569 F.Supp. at 1113–18. For an explanation of the Bellcore functions, *see* below. For some reason, the Department of Justice did not analyze the competitive effect of joint Regional Company purchasing decisionmaking, although it does concede that Bellcore could function to disadvantage the Regional Companies' competitors. Response at 124.

147. *See* note 140, *supra*.

ed.[146] The reason for that reticence is simple.

Bellcore has responsibility under the decree to prevent the technical fragmentation and hence the deterioration of the national telephone network; to perform the technical and engineering responsibilities that must be performed on a centralized basis if there is to be a single functioning system; to set the technical and performance standards for network equipment; and to act as a central liaison between the civilian telephone system and the military's and other emergency functions. *AT & T*, 552 F.Supp. at 208–09; *Western Electric Co.*, 569 F.Supp. at 1114–18. To decentralize or otherwise to limit the responsibilities of Bellcore so as to prevent its use as a vehicle for anticompetitive action by the Regional Companies would inevitably fragment and frustrate Bellcore's centralizing responsibilities which, notwithstanding the divestiture, permit the nation's telecommunications systems to continue to function on the basis of one national network with one national quality standard. It would also undermine Bellcore's ability to act as the critical link between the civilian telephone systems and the national defense communications networks.[149]

The Bellcore problem thus resembles the squaring of the circle. If Bellcore's powers are cut back to safeguard against Regional Company collusion in manufacturing, marketing, and purchasing, it will be deprived of the capacity to perform its national coordinating and standard-setting functions; if its powers are left intact, it will stand as a suitable vehicle for joint Regional Company action with respect to the manufacture of telecommunications equipment and CPE.

D. *Effect of Removal on Innovation*

Not only is there no basis for concluding that the conditions that caused the establishment of the manufacturing restriction in the decree have ceased to exist, but the removal of that restriction at this juncture would arrest or nullify significant positive developments that have occurred since then.

As discussed above, it cannot be seriously disputed that the Regional Companies' local exchanges continue to be monopolies; that a Regional Company that was permitted to enter manufacturing would satisfy its equipment needs exclusively or primarily from its own affiliate; and that such activities would contravene the very purpose of the decree—to prevent leveraging of Regional Company local exchange monopolies so as to foreclose independent manufacturers from a very substantial part of the telecommunications market. For these reasons, retention of the manufacturing restriction is supported by consumers,[150] interexchange carriers,[151] independent local exchange carriers,[152] cellular carriers,[153] manufacturers, suppliers, and servicers,[154] labor unions,[155] and state regulators.[156]

148. The Department of Justice relies on its old standby for situations presenting no answer consistent with its position—the possibility of a new antitrust action. Response at 124. *See* note 107, *supra*.

149. *Western Electric Co.*, 569 F.Supp. at 1113–15.

150. *E.g.*, Consumer Federation of America Comments at 2, 36–40; Ad Hoc Telecommunications Users Committee Comments at 11–12; International Communications Association Comments at 11–12.

151. General Electric Communications and Services Comments at 30–33; MCI Response at 70–79.

152. United Telecommunications Comments at 24–25; Taconic Telephone Corporation Comments at 14–17.

153. McCaw Communications Comments at 17–19.

154. Electronic Industries Association Comments at 18–22; North American Telecommunications Association Comments at 7–42; IDCMA Comments at 14–62; United States Telecommunications Suppliers Associations Comments at 17–53; Tandy Corporation Comments at 10–30; CBEMA Comments at 29–33.

155. Communication Workers of America Comments, Appendix at 6–9.

156. Public Service Commission of the District of Columbia Comments at 27–29, 36–38; Kentucky Public Service Commission Comments at 23–25, 28.

The Regional Companies argue in response that the negatives, both in regard to substance and to opinion in the marketplace of ideas, are outweighed by the fact that research, innovation, development of new products, and improvements in quality assurance would be inhibited unless they are permitted to participate in the various aspects of the manufacturing cycle.[157] One problem with that argument is that it precisely mirrors the points advanced by the Bell System at the trial of this case—that the efficiencies of integration outweigh such independent competition as might occur as a consequence of freer entry into the market, and that research and development would wither if the Bell System were broken up—and that were squarely rejected by the decree, as they had to be on these facts under the antitrust laws.[158] Almost by definition, these same arguments cannot qualify as changes cognizable under section VIII(C).

Another, equally compelling answer is that the Regional Company argument has already been proved to be factually wrong: there has been a flowering of research, development, innovation, introduction of new products, and quality assurance; new firms have entered the market; prices of equipment have declined dramatically[159] (according to some by as much as fifty percent in some categories);[160] and competition flourishes in a market that had seen relatively little of it before. The equipment market now consists of some six or eight very large firms, one to two hundred medium-sized firms, and hundreds of still smaller, vigorous, and inventive firms,[161] some of them in profitable relationships with one or more of the Regional Companies.[162]

If the restriction were removed, there would be a serious risk of a return to conditions of anticompetitive activity, concentration of the telecommunications equipment market in few hands, monopolistic pricing, and a relatively sluggish pace of innovation. According to a distinguished outside observer, the Regional Companies would then become "central vigorous players in the equipment market, buying many of the smaller [firms], integrating services and equipment sales, and developing into seven smaller versions of what once was AT & T."[163]

Certainly the emergence since entry of the decree of a dispersed equipment market characterized to an unprecedented extent by innovation[164] is proof that the fruitful competition the decree sought to establish is here. If this nation is serious about the need for competing effectively with ever more ingenious foreign producers, especially in a high technology market such as telecommunications, the sources of invention and innovation represented by competition and by competitors that do not rely

157. *See, e.g.*, NYNEX Comments at 43–47; BellSouth Comments at 22–23; Ameritech Comments at 36–40; Southwestern Bell Comments at 55; U S West Comments at 33–34.

158. Vertical integration is not unlawful as such; but it can be anticompetitive under certain circumstances where there is a mix of regulated and unregulated operations. *AT & T*, 524 F.Supp. at 1369, 1373.

159. Department of Justice Report at 162–63, 171–73.

160. U.S. Telecommunications Suppliers Association at 12–13.

161. Salomon Brothers, Stock Research on Telecommunications Equipment, the United States Market, at 11 (Feb. 1987); Electronic Industry Association at 2.

162. One Regional Company argues that the restriction "'quarantine[s] the unique capabilities and knowledge the [companies] gain from designing, operating, and maintaining the local network.'" U S West Memorandum at 87 (quoting Stantel Telecommunications Comments at 24). Not only does this argument simply repeat points made over and over during the trial by the Bell System with singular lack of success, but it is also factually erroneous. The restriction merely prevents the Regional Companies from once again exploiting knowledge gained by virtue of their privileged monopoly franchises for their sole benefit and for anticompetitive purposes; it does not prevent that knowledge from being disseminated among and used by manufacturers for the benefit of the telecommunications system, the industry, and the public.

163. Salomon Brothers, Stock Research on Telecommunications Equipment, *supra*, at 11 (Feb. 1987).

164. *See* note 330, *infra*.

on fixed rates of return as the principal source of their income must not be shut off.

In any event, insofar as this Court's obligations under the antitrust laws and under the decree are concerned, it is not prepared to halt the progress that has been made by independent manufacturers and sellers, large and small, toward a genuinely competitive environment in the telecommunications equipment market, by modifying the decree so as to turn back the clock toward domination of the market by the Bell monopolists.

E. *Foreign-Dominated Firms Crowding Out Specialized Manufacturers*

The Regional Companies finally contend that such factors as the economies of scale involved in manufacturing, the increasing standardization of interconnection requirements, and the vigor of the existing competition will prevent them from becoming regional monopolists should they be allowed into the manufacturing market. That contention, too, lacks merit.

In the first place, several of the assumptions underlying this contention are not correct. For example, although economies of scale apply to some types of equipment, they do not to others. Likewise, the trend in interconnection requirements for such items as data communications equipment has actualy been toward less uniformity.[165]

Beyond that, while the competitive nature of the equipment manufacturing business depends to an extent upon the type of market that is at issue, the fact that competition is presently healthy and strong in many markets does not diminish the ability of the Regional Companies to leverage their monopoly power should they be allowed into manufacturing.

The Department of Justice acknowledges that removal of the restriction will be followed by the displacement of many of the competitors, postulating that increasing concentration in the equipment markets is inevitable. Report at 171–76. However, trends with respect at least to some types of equipment have been precisely in the opposite direction, and whatever inevitability there is to greater concentration would flow primarily from the effects of the removal of the restrictions. *See* pp. 561–62, *infra*. The Department's position contemplates, with what may only be characterized as remarkable equanimity for an antitrust enforcement agency, the ready destruction of many high-quality firms producing high-quality goods that have emerged since divestiture, and that are performing important service to the economy. Indeed, according to another government agency, the Commerce Department's NTIA, the most innovative and efficient American businesses are rarely the largest or the most highly integrated but smaller, specialized firms.[166] NTIA Trade Report: *Assessing the Effects of Changing the AT & T Antitrust Consent Decree* at 17–18 (February 4, 1987).[167]

Moreover, the Department of Justice lack of concern regarding concentration ignores the effect such concentration will have on the survival of competition itself in several equipment markets, and the threat that will be posed by the ensuing manufacturing monopoly or oligopoly involving foreign firms. According to NTIA, the most plausible scenario in at least one telecommunications market is that, in the event of

165. While economies of scale are present in central office switch manufacturing, they are not in the data communications equipment industry. *Compare* IDCMA Comments at 30 *with* Department of Justice Report at 171–76 *and* Huber Report at 14.14. The trend in interconnection requirements has been toward less uniformity with respect to data communications equipment. IDCMA Comments at 42–43.

166. The manufacture of some products, such as data transmission equipment, including modems, digital data sets, multiplexers, and network management systems, is today highly decentralized, involving many small firms.

167. NTIA goes on to comment that "It is no secret that large U.S. corporations have not always proven successful when confronted with aggressive foreign-based ... competition ... [F]irms such as AT & T ... did not quickly develop the ability to function in competitive markets because for years the company did not need to, and devoted its resources to satisfying 'captive' Bell System requirements." NTIA Trade Report at 17–18.

a removal of the decree restriction on manufacturing, the Regional Companies will join forces with mammoth manufacturing empires,[168] most likely foreign,[169] and that this will pose a substantial risk of destruction of the United States central office equipment manufacturing industry. NTIA Trade Report at 125–26.[170]

These predictions are plausible. Dr. Huber's survey has found that affiliations between central office switch manufacturers and telephone service companies have tended to develop around the world wherever structural restraints are absent. Huber Report at 14.21–23. This is not surprising. Manufacturers have strong incentives to seek market share "guarantees" in the form of an affiliation with large exchange service providers such as the Regional Companies; and these companies, in turn are attracted by the acquisition of expertise and, more importantly, the minimization of risk embodied in partnerships with huge manufacturers with ample capital.

Because of their size, capital, and assured source of income from the ratepayer-supported telephone affiliates of the Regional Companies, these international giants will have the market power to adjust price almost at will to achieve market share, to the inevitable detriment of independent domestic producers. In short, the effect of the Justice Department's scenario is likely to be the displacement of small, efficient American firms by a few huge syndicates composed of foreign company and Regional Company components whose survival and domination in this environment will have been achieved by factors unrelated to efficiency or quality of performance.

Among its many other undesirable consequences, such a development would further reduce competition in this country, if only because the combination of foreign capital and the Regional Company monopoly position [171] with a captive market amounting to some seventy percent of the total market will prove fatal to whatever independent or smaller producers still survived. Another likely consequence would be a strong detrimental effect on the international competitiveness of the American telecommunications industry and the employment opportunities of American workers. NTIA Trade Report at 108–09.

In sum, not only has no change occurred in telecommunications and CPE manufacturing since 1982 that would justify the removal of the restriction under the section VIII(C) standard, but the opposite is true: a removal of the restriction would be likely to extinguish or substantially curtail the healthy competitive domestic market that has emerged in the last three years. There is no justification for removing the manufacturing restriction, and the requests for such removal will be denied.

V

Information Services

[11] Section II(D)(1) of the decree prohibits the Regional Companies from providing "information services." *AT & T*, 552 F.Supp. at 227.[172] An information service is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information which may be conveyed via telecommunications." *AT & T*, 552 F.Supp. at 229.[173]

168. NTIA Trade Report, *Assessing the Effects of Changing the AT & T Antitrust Consent Decree* at vi (February 4, 1987).

169. Notably, one of the few intervenors to support removal of the restriction is Stantel Telecommunications, Inc., the U.S. subsidiary of Great Britain's Standard Telephone and Cable plc. Comments at 2.

170. *See also* Huber Report at 1.16, 1.17, 14.25.

171. The eagerness of the Regional Companies to combine with foreign manufacturers is exemplified by BellSouth's passionate argument in favor of such ventures. Response to Comments at 39–40.

172. A somewhat related provision, section VIII(D) of the decree, prohibits AT & T from providing electronic publishing, a type of information service, for a period of seven years from the date of entry of the decree. *AT & T*, 552 F.Supp. at 231.

173. The Department of Justice claims to have some difficulty in distinguishing between exchange services and information services. Report at 106, 116. This claim is somewhat puz-

While the decisions on interexchange services (Part III) and on manufacturing (Part IV) are not particularly difficult, because no persuasive case has been or can be made that the particular restrictions are eligible on any reasonable basis for removal under section VIII(C) of the decree, the problem is more difficult with respect to the information services restriction which is discussed here and in Part VIII, *infra*.

If the Court were to consider only the request of the Regional Companies and of the Department of Justice for a complete removal of the restriction on the provision of information services, without distinction between content and transmission, that decision, too, would plainly have to be in the negative, for the information services restriction is supported by the same factors that require retention of the interexchange and manufacturing prohibitions.

As the Court stated in the 1982 Opinion explaining the provisions of the decree:

> All information services are provided directly via the telecommunications network. The Operating Companies would therefore have the same incentives and the same abilities to discriminate against competing information service providers that they would have with respect to competing interexchange carriers. Here, too, the Operating Companies could discriminate by providing more favorable access to the local network for their own information services than to the information services provided by competitors, and here, too, they would be able to subsidize the prices of their services with revenues from the local exchange monopoly.

AT & T, 552 F.Supp. at 189 (footnote omitted).

The Court went on to say at the time that, if the Operating Companies were excluded from the information services market, they would have an incentive to design their networks to accommodate the maximum number of information service providers on account of the earnings they could expect to receive from these providers in terms of access fees. On the other hand, if these companies were permitted to provide their own information services, their incentive would be "to design their local networks to discourage competitors, and thus to thwart the development of a healthy, competitive market." *AT & T*, 552 F.Supp. at 189–90 (footnote omitted).

Based upon these considerations, the Court has consistently upheld the restriction as incorporated in the proposed consent decree submitted by the parties. Thus, it explicitly rejected the suggestion, made early on, that the Regional Companies could "most efficiently provide information services by taking advantage of various economies," for example by the use of the same equipment for exchange telecommunications and information services. *AT & T*, 552 F.Supp. at 189 n. 238. The Court concluded that it would be impossible to determine whether such an advantage was due to inherent efficiencies or to efficiencies resulting from the deliberate design of the network in a discriminatory fashion. *Id.*[174] Similarly, in response to a 1984 request by the Regional Companies for a waiver of the line of business restrictions in section II(D)(1) of the decree, the Court reaffirmed that removal of the information services restriction would have to await "significant technological or structural changes" that would substantially reduce the dependence of information service providers on the local exchange networks. *AT & T*, 592 F.Supp. at 868. And the Court found that, as of that time, no such changes had occurred.[175]

zling, for it was the Department that made the distinction when it drafted the decree.

174. As explained above, network design is never complete; particularly where as dynamic a market as that for information services is involved, redesigns are not merely optional, they are often mandatory.

175. While competition in the various information services markets has substantially increased, *see* Part VIII, *infra*, these services vary widely with respect to concentration and ease of entry. Some markets, such as those for telephone answering services, public announcement services, and alarm monitoring, for example, are easy to enter and, in most geographic areas, unconcentrated. Others, including legal

A. *The Regional Company Bottlenecks*

There still has been no significant, relevant change in the situation. As discussed in Part II-B, *supra*, the Regional Companies continue to possess bottleneck control over the local exchange facilities, and these are the facilities upon which competitive information providers, like the Regional Companies' competitors in the interexchange and the manufacturing markets, depend.[176] As then Assistant Attorney General Douglas J. Ginsburg stated in a September 19, 1985 letter, to John D. Dingell, Chairman of the House Committee on Energy and Commerce, at pp. 5–6:

> [t]he Decree's basic restrictions on the BOCs' ability to provide information services are based on the BOCs' control of access to telephone customers through the local exchange network ... should conditions change to the degree that the BOCs no longer possess bottleneck monopolies over the local networks, it would be appropriate to consider removal of the information services restriction.

Competition in the local exchange markets is foreclosed now as it was then, because of the economic infeasibility of alternate local distribution technologies on a substantial scale. To be sure, information services can bypass the local monopoly bottlenecks controlled by the Regional Companies to a slightly greater extent than can interexchange services. However, as will now be seen, the various additional bypass technologies do not provide meaningful channels to the information service providers who, by the very nature of their business, must seek to reach large, dispersed audiences over reasonably priced, interactive facilities. NTIA, *Competition in the Local Exchange Telephone Services Market* at 29.

Thus, the physical transport of media through computer disks or CD-ROMS[177] is not comparable in functionality to on-line database services. The CD-ROMS are essentially storage mediums; they do not provide transactional capabilities, and they have largely fixed user costs. Another possible alternative, satellite transmission, is unsuitable for all except possibly some of the very largest users because (1) the general public itself could not be reached by way of satellite communications but only the Regional Companies' own facilities, and (2) satellite transmission is used efficiently primarily for a continuous, high volume stream of one-way data.[178] And while cable networks are not dependent for transmission on the local exchange network, they do depend on permission from the Regional Companies for attachment of their cables to the telephone companies' poles and the sharing of their conduit space.[179] In any event, regardless of the nature and scope of cable dependence on local exchange facilities, ubiquitous cable networks have yet to be developed,[180] and cable, too, generally provides only one-way data.

In short, there does not exist any meaningful, large-scale alternative to the facilities of the local exchange networks, and the information service providers remain as dependent upon those facilities, and those who control them, as they did in 1984 and as interexchange providers do at the present time.

Dr. Huber, the Department of Justice's expert, not only recognizes this conclusion throughout his report,[181] as does the

database access and retrieval, and transaction processing, are more highly concentrated. Department of Justice Report at 112; Huber Report at 6.50–6.51, 6.15–6.16, 7, 8, 10, 12–13.

176. *See generally* Analysis dated May 19, 1987, by Dr. Lee L. Selwyn and W. Page Montgomery on behalf of Teconomics and Technology, Inc., attached to the Reply of the Ad Hoc Telecommunications Users Committee.

177. CD-ROM stands for compact-disk read-only memory.

178. *See* Huber Report at 6.20–6.21.

179. Warner Cable Communications Comments at 12–14; *see also* National Cable Television Association Comments at 28–34.

180. Warner Cable Communications Comments at 15.

181. Although on the topic of information services, as on other topics, Dr. Huber endorses the general Department of Justice positions, the facts he reports on not infrequently support conclusions at variance with those positions.

NTIA,[182] but he correctly emphasizes that, because of their very nature, information services are especially vulnerable even to slight manipulation and discrimination, as they are also to small degradations in transmission quality. For that reason, he correctly concludes that the various examples of non-access-dependent services cited by the Department of Justice are not real substitutes, especially for "time-sensitive information services, [whose] competitive health ... depends strongly on continuing non-discriminatory access to [Regional Company][183] services and facilities." Report at 6.23. In another section in his report, he notes that

> [c]ompetition among database providers and electronic publishers is critically dependent on reliable fast delivery at a reasonable cost. The telephone network provides a critical link between many providers and their customers. The possibility of [Regional Company] entry into these information markets therefore raises the familiar concerns about the possibility of discriminatory access to [Regional Company] facilities.

Report at 7.7.

Again, according to Dr. Huber, the national value added networks "depend heavily on the [Regional Companies] to provide transparent access to end user's data traffic." Report at 5.18. In sum, while in his view new transport technologies are "on the horizon, the [Regional Company] still provides critical links in the transport pyramid." Report at 7.15.[184]

B. *Incentive and Ability to Discriminate*

It is necessary next to determine whether, with respect to the provision of information services, the incentive and ability of the Regional Companies to engage in anticompetitive conduct remains the same as it was when the decree was entered. The answer is plain. There has been no change whatever in this respect since 1984, and no demonstration that now, unlike then, there is no substantial possibility that the Regional Companies could not, and indeed would not, use their monopoly power to impede competition in the information services market.

The Regional Companies argue at some length that they have no incentive to discriminate against competitors in the information service market because to do so would diminish use of the network and hence a reduction in their revenues.[185] But in any market where the Regional Companies are in competition with independent information service providers, their economic interest lies in manipulating the system toward use of their own services, rath-

182. A technical analysis performed by NTIA likewise makes clear that the characteristics of alternatives relied on by the Department of Justice are incompatible with the needs of most information services: (1) private microwave systems require unobstructed line-of-sight transmission paths, and typical cost per small system is $12,000 to $38,000; (2) as to fiber optic systems, only thirty-three users of local fiber systems have been cited, targeted customers use either 24 or 672 voice grade equivalent channels, and primary use is for interexchange access or private networks; (3) only a small number of cable television systems have the costly equipment needed for two-way operations; (4) cellular radio systems are not generally appropriate for nonmobile service; costs make cellular service undesirable as a substitute for local service at this time; and long talking times could degrade service quality; (5) cost of digital termination systems may be higher than for microwave systems, over $7,850 per voice channel according to Bell Communications Research; and (6) satellite systems are most cost-effective for high traffic volume, long haul (greater than than 200 miles) applications, and cost per voice channel is as high as $2,000. NTIA, *Competition in the Local Exchange Telephone Services Market* at 29, 30–34, 37–38.

183. The Huber Report generally uses the broader term "LEC," but as indicated *supra*, the vast majority of local exchanges companies are Regional Company exchanges and, in any event, for purposes of this analysis, there is no relevant distinction.

184. Additionally, under the FCC's *Computer III* order, the Regional Companies may install information services equipment in their central offices, but their competitors must locate comparable equipment elsewhere, where, as General Electric Communications and Services Company emphasizes, Opposition at 23, their more expensive interconnections can be subject to delay and other manipulation.

185. NYNEX Response at 32–33; U S West Memorandum at 42.

er than in encouraging maximum use of the network by their information service competitors. Only ten to twenty percent of the total cost of an information service is accounted for by Regional Company usage costs, Huber Report at 6.29, and a Regional Company would therefore earn far more from a customer base through use of its own information service than it would through network usage by calls made by and to its information service competitors.

That the ability for abuse exists as does the incentive, of that there can also be no doubt. As stated above, information services are fragile, and because of their fragility, time-sensitivity, and their negative reaction to even small degradations in transmission quality and speed, they are most easily subject to destruction by those who control their transmission. Among the more obvious means of anticompetitive action in this regard are increases in the rates for those switched and private line services upon which Regional Company competitors depend while lower rates are maintained for Regional Company network services; manipulation of the quality of access lines; impairment of the speed, quality, and efficiency of dedicated private lines used by competitors; development of new information services to take advantage of planned, but not yet publicly known, changes in the underlying network; and use for Regional Company benefit of the knowledge of the design, nature, geographic coverage, and traffic patterns of competitive information service providers.[186]

Dr. Huber, too, has recognized that the Regional Companies are able to discriminate in the provision, maintenance, and restoration of private lines, access or timing of new basic transmission services, and misuse of customer and competitor information, Report at 7.10, and furthermore that costs can be shifted to regulated business on a large scale.[187] Huber Report at 12.16, 11.18, 10.23, 13.11, 9.9, 8.12, 7.15; *see also* Comments of Information Industry Association at 13–15.

Even now, when the opportunity for improper activity by the Regional Companies is minimal compared to what it would be if the restriction were lifted, danger signals have begun to appear. For example, Dun & Bradstreet complains that in the Yellow Pages directory market BellSouth is duplicating the Bell System pattern of refusals to deal with competitors, protests of willingness to do so being followed by bad faith negotiation, and further delay. That particular dispute appears to be pending in the courts. Comments at 35–36 n. 15.

Similarly, Metscan, an automatic meter reading and monitoring system, claims to have been treated with respect to its connecting jacks just as the Bell System treated equipment competitors—delays, excessive charges, and difficulties in achieving satisfactory access of necessarily interconnection devices. Comments at 7–8.

To the extent that it is possible for them to do so, the Regional Companies may even now be engaged also in improper cross-subsidization. For example, a study undertaken by the staff of the California Public Utilities Commission of Pacific Bell's relationships with its affiliates found evidence that: (1) Pacific Bell and its ratepayers were not adequately compensated for the loan or transfer of skilled personnel to

186. *See* Comments of ADAPSO at 21–22; Opposition of General Electric Communications and Services at 21.

187. That report notes at 7.15 that "[c]ross-subsidy is possible for some major cost categories"; at 8.12, that the "[Regional Companies] retain a very strong hold on [information service provider] access to [Public Announcement Services] customers through 976 services"; at 10.21, that "[i]f the BOCs were allowed to enter the market for [Voice Storage and Retrieval] service, they might be able to compete unfairly by shifting the costs of unregulated VSR service into their regulated accounts, thus reducing their apparent costs of providing service"; at 11.18, that "[i]f a BOC offered electronic mail service, about 70 percent of the costs of the service bureau would be potentially shiftable to the BOC's regulated accounts"; at 12.7, "[i]f the BOCs were allowed to enter the transactions processing market, they would have an incentive to hinder their competitors in that market by denying them access to inputs over which the BOCs had control"; at 12.16, "substantial potential for cross-subsidy appears to exist"; and at 13.11, "the [Regional Company] still provides critical links for alarm providers".

unregulated operations; (2) Pacific Bell provided legal and training services to competitive operations at below market value and Pacific Bell employees performed unbilled work for unregulated affiliates; (3) properties were transferred from Pacific Bell to unregulated operations at below fair market value; (4) technology was transferred to competitive operations from Pacific Bell on an uncompensated basis; and (5) PacTel unregulated operations were gratuitously benefiting from their affiliation with Pacific Bell. California Public Utilities Commission, *A Report on Pacific Bell's Affiliated/Subsidary Companies*, Proceeding No. A.85-01-034 (June 3, 1986).

Perhaps even more telling is the Department of Justice's recognition that "[o]ne cannot be as definitive with respect to to the potential competitive effects of a [Regional Company's] provision of information services that use [its] local exchange facilities" as with respect to those that do not.[188] Report at 122.[189] As discussed above, almost all information services must and do use the Regional Companies' local exchange facilities.

In short, the reasons cited by the Court in 1982 and in 1984 are as valid today as they were then. There is no question but that the Regional Companies would have the same incentives and the same abilities attributed to them at that time, and that to open up the information services market to its full extent, as requested by some, would be to take the very risks [190] that neither the Department of Justice nor the Court were willing to take three years ago, and that the decree plainly forbids. The restriction on the sale by the Regional Companies of information content will accordingly be maintained. With respect to the issue of information transmission, *see* Part VIII, *infra*.

188. Up-to-date information and constant availability are the features most sought by subscribers. Comments of Leghorn Publishing Company at 5.

189. The status of FCC regulation and its lack of present effectiveness are of course no different in the information services market than they are with respect to interexchange services and manufacturing (*see* Part VI, *infra*), and the division of the Bell System into seven Regional Companies and what progress has been made with respect to equal access have likewise no greater weight here than they have in the other contexts discussed above.

VI

Regulation

The Regional Companies and the Department of Justice argue that, unlike during the period prior to the entry of the decree, FCC regulation can now be depended upon to keep those in control of the local exchanges from engaging in anticompetitive activities, whether in interexchange services, in manufacturing, or in information services. The Court has carefully considered these arguments as well as the regulations on which they are based. Upon such consideration, the Court has concluded that there is no reasonable basis for assuming that the regulations will solve the antitrust problems presented by this case.

A. *General*

First. As discussed in Part I, *supra*, despite the decades-old requirements in the Communications Act, 47 U.S.C. § 202(a), and various FCC regulations requiring nondiscrimination, equal access, and proper cost allocations, and notwithstanding the Commission's own persistent and dedicated efforts for a number of years, the FCC was unable to prevent or to remedy major anticompetitive abuses by the Bell System achieved through the activities of its local affiliates.

A substantial part of the trial of this case revolved around the ever-changing Bell

190. As the Committee of Corporate Telecommunications Users notes, there are also important privacy considerations at stake when, for example, a Regional Company, having control of its customers' lines of communication, will also have access to their lines of credit, travel plans, credit card expenditures, medical information, and the like. Comments at 17-19. On the basis of a subscriber's telephone calling patterns with respect to information, a Regional Company could easily pinpoint that subscriber for the sale of Regional Company-generated information and the sale of other products and services connected therewith, to the point where that company would have a "Big Brother" type relationship with all those residing in its region.

strategies and the Commission's largely futile efforts to cope with these strategies. The Department of Justice argued, and at the trial it introduced voluminous expert testimony and other evidence in support of its argument, that the local exchanges are so complex and so technically dynamic, and that they comprehend so many and such complex joint and common costs, that regulation could not prevent anticompetitive activities.[191] The Department accordingly stated in its Response to Public Comments on the Proposed Modification of Final Judgment, 47 Fed.Reg. 23,320–336 (May 27, 1982), at the time the consent decree was under consideration that:

> At the heart of the government's case in *United States v. AT & T* was the failure of regulation to safeguard competition in the face of the powerful incentives and abilities of a firm engaged in the provision of both regulated monopoly and competitive services. Neither of these problems [cross-subsidization and discrimination] has thus far proven amenable to successful regulatory solution. Indeed, the very basis for divestiture is that the anticompetitive problems inherent in the joint provision of regulated monopoly and competitive services are otherwise insoluble. Thus, permitting BOC entry into competitive markets would undermine the rationale for the divestiture that is the central remedial mechanism of the modification.

The Department went on to say that there was "little possibility" that regulation would be capable in the future of detecting or preventing discrimination by the Regional Companies. Response of the United States to Public Comments, *supra*, 47 Fed. Reg. at 23336.[192]

Second. At the time of the drafting of the consent decree, the parties also considered several detailed "regulatory" injunctions, in lieu of the more drastic solution finally adopted. These proposals were appropriately labelled by the parties "Quagmire I" and "Quagmire II." Department of Justice Competitive Impact Statement at 51–63. Ultimately, the Department concluded that regulatory measures could not "approach even remotely" the effectiveness of the more decisive decree that was submitted to the Court, *id.* at 53, and the Court endorsed that position. *AT & T*, 552 F.Supp. at 166–68.

There cannot be the slightest doubt, therefore, that as of the time of the entry of the decree, the parties[193] and the Court had concluded that regulation would not and could not be made to work, and that only the divestiture and the concomitant imposition of the line of business restrictions on the Regional Companies could be depended upon to prevent a resumption of anticompetitive activities.

Third. Given that record, reliance could properly be had on regulation as a basis for the removal of the decree restrictions only upon a showing of a reduced need for

191. *See, e.g.*, Department of Justice Memorandum of August 16, 1981, at 46–47, 125 n. *, 161–62, 281–82, 285, 374; Department of Justice Pretrial Brief at 24–25, 79–84.

It was the Bell System's position at the trial, just as it is the position of the Regional Companies now, that regulation is an effective instrument for preventing and curbing any possible anticompetitive activities. The decree implicitly rejected that position.

Prior to the entry of that decree, the FCC, like the Bell System, and unlike its own two longtime chiefs of the Common Carrier Bureau (*see* pp. 531–32, *supra*), contended that the regulations were adequate to prevent anticompetitive abuses. *See, e.g.*, Amicus Curiae Brief of FCC dated April 20, 1982, at 35–37. The Court instead accepted the contention of the Department of Justice, buttressed by the voluminous trial record, that the regulations could not solve the problems, and the decree was entered on that basis. *AT & T*, 552 F.Supp. at 187 n. 229; Department of Justice Response of May 20, 1982, at 57.

192. The basic problem was then what it still is today: the FCC was attempting, without significant success (1) to define various rights of access to the monopoly switches and to enforce these rights, and (2) to allocate what are inherently almost unallocable joint and common costs of the Operating Companies.

193. The Bell System did not concede, and the Court was not called upon to find, that violations of the antitrust laws had occurred. *See AT & T*, 552 F.Supp. at 210–11. However, the decree proceeds on the basis of an implicit assumption to that effect. *See also AT & T*, 524 F.Supp. at 1336–1381.

regulation or a substantial improvement in the regulatory language and practice.[194] Yet neither has occurred since 1982.

If anything, the need for the line of business restrictions is greater today than it was before the Bell System breakup. At least in theory, and to an extent in practice, the Bell System was regulated in almost all of its structures and operations.[195] By contrast, many of the current operations of the Regional Companies take place in unregulated markets. This complex mixture of regulated and unregulated activities provides these companies both with a powerful temptation and with ample opportunity to commit anticompetitive abuses in the competitive markets and to subsidize their competitive operations with profits earned in the monopoly markets.[196] In view of the fact that, when compared with the Bell System, the organizational state of the Regional Companies is much less rigid and far more complex—with their subsidiaries, partnerships, joint ventures, and other enterprises, some regulated, some unregulated, some regulated in part[197]—discrimination against competitors and cross-subsidization are far more difficult to detect, prevent, and rectify through regulation now than they were in 1982.[198]

Fourth. To the extent that there has been any recent change in the regulatory picture itself, it has been to weaken the regulations governing telecommunications carriers, not to strengthen them. This is shown most dramatically by the FCC's repeal of the separate subsidiary requirement for Regional Company competitive enterprises—a requirement that it had theretofore regarded as its most effective regula-

194. Several Regional Companies would stand the relationship between the decree and regulation on its head, contending that criticism of the efficacy of various FCC rules "are in reality reargruments of issues already presented to and rejected by the Commission." *E.g.*, Reply of Pacific Telesis at 42–45; *see also* Reply of Southwestern Bell at 21–23. The decree in this case was premised in substantial part upon the inadequacy of regulation as a means for dealing with practices that violated the Sherman Act. It is absurd to maintain that, if the same or similar regulations are still inadequate and that the decree's removal standard therefore cannot be met, the restrictions should be eliminated anyway because the Commission has not seen fit to adopt more effective regulations, and reargruments have either not been made or were made and have failed. The governing law of the case here is the decree, not FCC decisions.

Furthermore, the FCC is of course not charged with the duty of enforcing the antitrust laws; indeed, the Commission has suggested that it is quite prepared to ignore or override antitrust concerns. FCC Response in Opposition to AT & T Motion at 4–5.

In sum, the Regional Company arguments constitute simply one more attempt to reverse the burden of proof, evidently because of the realization that they could not satisfy the section VIII(C) standard. *See also* notes 26, 35, 38, 90, *supra*.

195. However, the FCC had no direct regulatory responsibility over Western Electric or Bell Laboratories. Department of Justice's Third Statement of Contentions and Proof at 1846.

196. *See also United States v. AT & T*, 627 F.Supp. 1090, 1095–96 (D.D.C.1986).

197. In addition, the Regional Companies are frequently changing their organizational structure. *See Washington Post*, July 8, 1987, at F1, regarding an apparently fundamental change in the corporate structure of Bell Atlantic with substantial implications for the monopoly and competitive operations.

198. Since each of the Regional Companies operates in several states, the state and local regulatory bodies likewise have a very difficult job, for none of them is likely to be aware of the entire financial and operational status of a Regional Company.. Thus, as the Colorado Public Utilities Commission points out, in a number of states the Regional Companies "are essentially unregulated although they absolutely and deeply affect the public interest," to the point where the Commission "cannot even look at the books and records of U S West," the Regional Company in that area. Comments at 2. *See also Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986).

Several Regional Companies rely upon *Southern Motor Carriers v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985), apparently for the proposition that the Sherman Act does not preempt state regulation. Reply of Pacific Telesis at 28–30. But the Supreme Court held in that case only that collective ratemaking activities are immune from antitrust liability under the state action doctrine enunciated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). That principle and that holding have no relevance to the instant lawsuit, let alone the instant proceeding.

tory tool.[199] The FCC has also announced that it will preempt any state from attempting to require structural separation or otherwise to institute stricter safeguards for Regional Company CPE operations than its own. *CPE Decision*, 2 FCC Rcd at 158–61; BOC Structural Relief Order at ¶ 112.[200]

Fifth. Between the 1950s and the early 1970s, the FCC was committed, as was the nation generally, to vigorous regulation of a variety of business enterprises, especially those with public utility characteristics. Much of that has changed. The FCC and individual members of the Commission have repeatedly expressed themselves in favor of wide deregulation.[201] The Court of course does not express any judgment on the wisdom of that policy; that is beyond its jurisdiction. However, a regulatory body that is committed in principle to as little regulation as possible can hardly be cited at the same time in support of the proposition that it will probably regulate more vigorously and more effectively than its predecessors which wanted to engage in tight regulation and operated in a general governmental environment that regarded strict regulation as a positive goal.[202]

Sixth. The FCC now has fewer resources with which to regulate telecommunications carriers than in the past, particularly in the difficult and complicated area of cost allocation that was a central issue in the trial and that is central to the issue of cross-subsidization today. Since the time of the entry of the decree, the FCC's budget and manpower have decreased significantly. In 1980, the FCC had an authorized ceiling of 2,108 employees; this had fallen by 1987 to 1,855 employees, and the Commission was apparently short by 120

199. Strong cost allocation controls were in existence on paper long before the decree was entered, but they proved to be consistently ineffective. *AT & T*, 552 F.Supp. at 160–65; Department of Justice Response at 79–82. As noted above, FCC officials themselves conceded that the Commission could not prescribe cost allocation standards for the Bell System, and when that body began formulating the rules that would apply after divestiture, it concluded that *no measures short of structural separation* could prevent the Regional Companies from exploiting their monopoly power to gain unfair advantages in unregulated markets. *Policy and Rules Concerning the Furnishing of Customer Premises Equipment and Enhanced Services and Cellular Communications Services by the Bell Operating Cos.*, 95 FCC 2d 1117 (1983), *aff'd sub nom. Illinois Bell Telephone Co. v. FCC*, 740 F.2d 465 (7th Cir.1984), *aff'd on reconsideration*, FCC 84-252, 49 Fed.Reg. 26,056 (1984), *aff'd sub nom. North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282 (7th Cir.1985). Curiously, in light of that history, one of the first steps taken by the Commission to "strengthen" the regulations was to eliminate the separate subsidiary requirement.

On a related point, the Ohio Office of Consumers' Counsel aptly remarks that, in considering cross-subsidization issues, it is well to keep in mind that the "local" network is in significant respects a "long distance" network because it has been constructed to meet the requirements of long distance service. Comments at 8. Fiber optic loops, for example, are classified as a basic exchange service cost even though they are not needed or particularly beneficial for basic local telephone service. *See* NASUCA Comments at 12.

200. The suggestion is made by some, including the Department of Justice, Response at 81, that the public is protected from excessive weakening of regulatory supervision by the availability of judicial review of FCC action. However, that review is in some respects quite limited. The Court of Appeals may not interfere with FCC decisions not to reject carrier-sponsored tariffs. *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1234 (D.C.Cir.1980). Even where a rate investigation is instituted, ratepayers have little judicial recourse. 47 U.S.C. § 204(a). And it is claimed by some that the Commission at times incorporates serious legal issues into ongoing investigations while permitting the challenged rates to go into effect so as to insulate them from judicial scrutiny. Comments of Aeronautical Radio, Inc., at 18–19.

201. Former FCC Chairman Mark J. Fowler last year carried this policy to its logical end when he proposed that "a three-year trial of total deregulation of telecommunications would be implemented in states willing to undertake such experiments." Fowler, Halprin & Schlichting, *"Back to the Future": A Model For Telecommunications*, 38 UCLA Com.L.J. 143, 194 (1986).

202. The lack of urgency with which the FCC approaches competitive issues is also exemplified by its bland comment that it had terminated an earlier proceeding on the equipment procurement practices of the integrated Bell System, although it "[stood] ready to revisit the issue...." FCC Comments as Amicus Curiae (March 13, 1987) at 27.